Syed Alwee bin Syed Mansor v Panglima Tentera Laut Diraja Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–107–04 OF 2017
AZIZAH NAWAWI J
19 APRIL 2018

Administrative Law — Judicial review — Illegality — Applicant terminated from his employment — Whether applicant convicted of any misconducts — Whether charges framed against applicant defective, unclear and uncertain — Whether there was any time frame imposed with regards to discretion of respondent to discharge any serviceman — Whether applicant victim of double jeopardy — Whether notice of termination communicated to applicant — Whether there was legal basis for respondent to make discharge order against applicant — Whether there was illegality

The applicant commenced his employment with Tentera Laut Diraja Malaysia ('TLDM') on 15 August 1996 and was supposed to retire on 14 August 2017. On 7 June 2014, a urine specimen was taken from the applicant and the chemist report confirmed that the applicant's urine specimen was positive for dextromethorphan and dexthorphan. The applicant was then charged with two charges of misconduct. During the hearing on 6 February 2015, the applicant pleaded guilty to both charges and was convicted and sentenced with a fine of 14 days' salary amounting to RM2,335.07 as well as a reprimand. In May 2015, the application for termination of the applicant was not approved by the former first respondent, however on 23 December 2016, the application for termination of the applicant was approved by the first respondent. In January 2017, based on a letter of 'Arahan Dokumentasi Tamat Perkhidmatan' dated 18 January 2017, the applicant was informed that his service had been terminated on 23 December 2016 on the grounds of misconduct in which he was convicted. Hence, the appellant filed the present action for judicial review to challenge the said decision. The applicant's ground to impugn the decision of the respondents were primarily premised on the issue of illegality: (a) that the termination was based on an alleged conviction on 23 December 2016, but there was no record to show that the applicant had committed or put on trial or convicted for any misconducts on 23 December 2016; (b) that the charges framed against the applicant were defective, unclear and uncertain as they failed to specify details of the alleged misconducts; (c) that the first respondent's action in approving the applicant's termination based on the grounds specified under reg 61(1)(j) of the 'Armed Forces (Terms of Service of Regular Forces) Regulations 2013' ('the 2013 Regulations') was a jurisdictional error since the first application under the same Rule was not approved by the former first

respondent; (d) that the applicant had become a victim of double jeopardy due to the reason that the former first respondent had rejected the applicant's termination under reg 61(1)(j) of the 2013 Regulations; and (e) that the official notice of termination of service was never communicated nor served on the applicant which had created confusion to the applicant and caused the applicant's rights to appeal against the said decision had been rejected.

Held, dismissing the application with costs:

(1) The court accepted the explanation of the first respondent that he had approved the termination of the applicant on 23 December 2016 and that the said date was not a reference to a conviction on 23 December 2016. This could be seen from exh 'SA-21' annexed to the applicant's affidavit, which was the 'PERMOHONAN PEMBERHENTIAN ASKAR LASKER' and in the column 'TANDATANGAN PEGAWAI PEMBERHENTIAN' was the signature of the first respondent which was signed on 23 December 2016 (see para 21).

(2) The applicant had never challenged the charges and the conviction entered against him on 6 February 2015, after his plea of guilty. Subsequently, the applicant was sentenced with a fine of 14 days' salary amounting to RM2,335.07 and a reprimand. Added to that, the applicant did not apply to quash or challenge the said conviction and sentence in the courts. Therefore, since the 2015 conviction and sentence had not been quashed or reversed on appeal, the said conviction and sentence could not be challenged in the present proceedings (see paras 23–25).

(3) From the plain reading of reg 61(1) of the 2013 Regulations, it was clear that the competent authority may, at any time discharge any serviceman. Therefore, it was within the discretion of the respondent to discharge a serviceman, at any time. Therefore, there was no time frame imposed with regards to the discretion of the respondent to discharge any serviceman (see para 31).

(4) The principle of double jeopardy only applies in criminal conviction, whereby a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence. In the present case, the applicant was not being tried on the same charges as in the 2014 charges but challenging his termination from the TLDM (see para 38).

(5) There was no submission on the issue that the official notice of termination of service was never communicated nor served on the applicant, but on the facts, it was not in dispute that the applicant was informed orally on this (see para 39).

(6) In the present case, reg 61(1)(j) of the 2013 Regulations empowered the respondents to discharge the applicant at any time premised on a

'misconduct committed by the serviceman and he has been convicted'. Since there was a misconduct resulting in the 2015 conviction and sentence against the applicant, there was a legal basis for the respondents to make the discharge order against the applicant (see para 40).

[Bahasa Malaysia summary

Pemohon memulakan pekerjaannya dengan Tentera Laut Diraja Malaysia (TLDM) pada 15 Ogos 1996 dan sepatutnya bersara pada 14 Ogos 2017. Pada 7 Jun 2014, spesimen air kencing diambil dari pemohon dan laporan ahli kimia mengesahkan bahawa spesimen air kencing pemohon adalah positif untuk dextromethorphan dan dexthorphan. Pemohon dikenakan dua tuduhan salah laku. Semasa pendengaran pada 6 Februari 2015, pemohon mengaku bersalah terhadap kedua-dua pertuduhan itu dan telah disabitkan dan dihukum dengan denda 14 hari gaji kepada RM2,335.07 berserta teguran. Pada bulan Mei 2015, permohonan pemecatan pemohon tidak diluluskan oleh bekas responden pertama, tetapi pada 23 Disember 2016, permohonan penamatan pemohon diluluskan oleh responden pertama. Pada Januari 2017, berdasarkan surat bertarikh bertarikh 18 Januari 2017, pemohon dimaklumkan bahawa perkhidmatannya telah ditamatkan pada 23 Disember 2016 atas sebab salah laku di mana dia telah disabitkan. Oleh itu, permohon memfailkan tindakan ini untuk semakan kehakiman bagi mencabar keputusan tersebut. Alasan pemohon untuk mempersoalkan keputusan responden adalah terutamanya berdasarkan pada isu penyalahgunaan: (a) penamatan itu berdasarkan pada sabitan pada 23 Disember 2016, tetapi tidak ada catatan untuk menunjukkan bahawa pemohon telah melakukan atau dibicarakan atau disabitkan atas apa-apa salah laku pada 23 Disember 2016; (b) bahawa tuduhan yang dipertuduhkan terhadap pemohon adalah cacat, tidak jelas dan tidak pasti kerana mereka gagal menentukan butiran salah laku yang dikatakan; (c) bahawa tindakan responden pertama meluluskan penamatan pemohon berdasarkan alasan yang ditetapkan di bawah peraturan 61(1)(j) Peraturan-Peraturan Angkatan Tentera (Terma Perkhidmatan untuk Angkatan Tetap) 2013 ('Peraturan 2013') adalah kesalahan bidang kuasa kerana permohonan pertama di bawah peraturan yang sama tidak diluluskan oleh bekas responden pertama; (d) bahawa pemohon telah menjadi mangsa pendakwaan dua kali kerana bekas responden pertama telah menolak penamatan pemohon di bawah peraturan 61(1)(j) Peraturan-Peraturan 2013; dan (e) bahawa notis rasmi penamatan perkhidmatan tidak pernah diberitahu ataupun disampaikan kepada pemohon yang telah membentuk kekeliruan terhadap pemohon dan menyebabkan hak pemohon untuk membuat rayuan terhadap keputusan tersebut telah ditolak.

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah menerima penerangan daripada responden pertama bahawa beliau telah meluluskan penamatan pemohon pada 23 Disember 2016

dan bahawa tarikh tersebut bukanlah rujukan kepada sabitan pada 23 Disember 2016. Ini boleh dilihat daripada eksh 'SA-21' yang dilampirkan kepada afidavit pemohon, yang mana 'PERMOHONAN PEMBERHENTIAN ASKAR LASKER' dan dalam ruangan 'TANDATANGAN PEGAWAI PEMBERHENTIAN' adalah tandatangan responden pertama yang ditandatangani pada 23 Disember 2016 (lihat perenggan 21).

(2) Pemohon tidak pernah mencabar tuduhan dan sabitan yang dimasukkan terhadapnya pada 6 Februari 2015, selepas pengakuan bersalahnya. Selepas itu, pemohon dihukum dengan denda gaji 14 hari berjumlah RM2,335.07 dan teguran. Ditambah lagi, pemohon tidak memohon untuk membatalkan atau mencabar sabitan dan hukuman tersebut di mahkamah. Oleh itu, memandangkan sabitan dan hukuman 2015 tidak dibatalkan atau diakaskan atas rayuan, sabitan dan hukuman tersebut tidak boleh dicabar dalam prosiding sekarang (lihat perenggan 23–25).

(3) Dari bacaan biasa peraturan 61(1) Peraturan 2013, adalah jelas bahawa pihak berkuasa berwibawa boleh, pada bila-bila masa melepaskan mana-mana anggota tentera. Oleh itu, ia adalah mengikut budi bicara responden untuk melepaskan seorang askar, pada bila-bila masa. Oleh itu, tidak ada tempoh masa yang dikenakan terhadap budi bicara responden untuk melepaskan mana-mana anggota tentera (lihat perenggan 31).

(4) Prinsip pendakwaan dua kali hanya terpakai dalam sabitan jenayah, di mana seseorang yang telah dibebaskan atau disabitkan atas suatu kesalahan oleh mahkamah tidak boleh dibicarakan semula bagi kesalahan yang sama. Dalam kes ini, pemohon tidak dibicarakan atas tuduhan yang sama seperti dalam pertuduhan 2014 tetapi mencabar penamatan dari TLDM (lihat perenggan 38).

(5) Tidak ada hujahan mengenai isu bahawa notis rasmi penamatan perkhidmatan tidak pernah dihubungkan atau disampaikan kepada pemohon, tetapi hakikatnya, ia tidak dipertikaikan bahawa pemohon telah dimaklumkan secara lisan akan perkara ini (lihat perenggan 39).

(6) Dalam kes ini, peraturan 61(1)(j) Peraturan-Peraturan 2013 yang memberi kuasa kepada responden untuk melepaskan pemohon pada bila-bila masa yang ditetapkan berasaskan 'misconduct committed by the serviceman and he has been convicted'. Memandangkan terdapat salah laku yang mengakibatkan sabitan dan hukuman 2015 terhadap pemohon, terdapat asas undang-undang bagi responden untuk membuat perintah pelepasan terhadap pemohon (lihat perenggan 40).]

Notes

For cases on illegality, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 455–457.

Cases referred to

Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor [2011] 2 MLJ 573; [2011] 2 CLJ 1, FC (refd)

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515; [1999] 4 CLJ 121, HC (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Gabongan Kesatuan Pekerja-pekerja Dalam Perkhidmatan-perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor [1998] 5 MLJ 209; [1997] 1 LNS 251, HC (refd)

Lye Pong Fong v PP [1998] 6 MLJ 304, HC (refd)

Palautah a/l Sinnappayan & Anor v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 295; [2009] 3 MLRA 307, FC (refd)

PP v Teh Cheng Poh [1978] 1 MLJ 68b (refd)

Legislation referred to

Armed Forces Act 1972 s 130

Armed Forces (Terms of Service of Regular Forces) Regulations 2013 reg 61(1)(j)

Criminal Procedure Code s 399

Federal Constitution art 7(2)

Khadzar Yusof (Sharifah Nor Azizah bt Syed Abdul Rahman with him) (Sharifah Azizah & Co) for the applicant.

Muzila Mohamed Arsad (Noor Fadila Ishak with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Azizah Nawawi J:

APPLICATION

[1] This is the applicant's substantive application for judicial review proceedings seeking the following prayers:

(a) an order of certiorari to quash the respondents' decision in terminating the applicant's service effective 23 December 2016 which was communicated to the applicant through the first respondent's letter dated 18 January 2017;

(b) an order of mandamus that the applicant is to be reinstated as a member of Tentera Laut Diraja Malaysia ('TLDM') with the same post immediately;

(c) a declaration that the applicant is, at all material times and still a soldier serviceman holding a position of PW1 TLS in TLDM's service until the last date of his service which was on 14 August 2017;

(d) a full account to be taken by the deputy registrar pertaining to the applicant's entitlement to all salary, allowances and pension benefits and/or retirement and/or other benefits that should be received by the applicant if he was not terminated from the service and that the said amount to be paid to the applicant forthwith until the last date of his service which was on 14 August 2017; and

(e) general, aggravated and/or exemplary damages.

[2] The grounds of the application are:

(a) that the applicant was terminated from the TLDM's service based on the alleged misconduct committed by the applicant in which the applicant was later convicted on 23 December 2016. Nevertheless, there was no record to show that the applicant had committed or put on trial or convicted for any misconduct on 23 December 2016;

(b) that the charges framed against the applicant were defective, unclear and uncertain as they failed to specify the details of the alleged misconduct. Therefore, the applicant's guilty plea to those charges which resulted in the applicant's termination under reg 61(1)(j) Armed Forces (Terms of Service of Regular Forces) Regulations 2013 ('the 2013 Regulations') was invalid;

(c) that the first respondent's action in approving the applicant's termination based on the grounds specified under reg 61(1)(j) of the 2013 Regulations was a jurisdictional error since the first application under the same rule was not approved by the former first respondent;

(d) that the applicant has become a victim of double jeopardy due to the reason that the former first respondent had rejected the applicant's termination under reg 61(1)(j) of the 2013 Regulations; and

(e) that the official notice of termination of service was never communicated nor served on the applicant. This had created confusion to the applicant and caused the applicant's rights to appeal against the said decision has been denied.

[3] Having considered the application and the submission of the parties, this court had dismissed the application with costs.

THE SALIENT FACTS

[4] The applicant commenced his employment with TLDM on 15 August 1996 and was supposed to retire on 14 August 2017. The applicant's last post was in Pasukan Bantuan Gugusan Semarang Peninjau ('PBGSP') which was based at Teluk Sepanggar, Kota Kinabalu, Sabah.

[5] On 6 June 2014, the applicant was involved in a road accident and was brought to Karamunsing Police Station, Kota Kinabalu. He was then referred to the Military Police and was then brought to Pejabat Cawangan Siasatan Khas PROVOS KOTA KINABALU Pangkalan TLDM Kota Kinabalu, Teluk Sepanggar 88846 KOTA KINABALU Sabah. On 7 June 2014, a urine specimen was taken from the applicant, which was sent to the Chemist Department, Sabah on 9 June 2014 for analysis.

[6] The chemist report issued under s 399 of the Criminal Procedure Code confirmed that the applicant's urine specimen is positive for dextromethorphan and dexthorphan.

[7] On 24 October 2014, the applicant was charged with two charges of misconduct. The charges read as follows:

> PERTUDUHAN PERTAMA
>
> TIDAK MEMATUHI PERINTAH-PERINTAH TETAP YANG BERTENTANGAN DENGAN SEKSYEN 51(1) AKTA ANGKATAN TENTERA 1972
>
> Iaitu ia di Pejabat Cawangan Siasatan Khas PROVOS KOTA KINABALU Pangkalan TLDM Kota Kinabalu, Teluk Sepanggar 88846 KOTA KINABALU Sabah, pada 07 Jun 2014 lebih kurang 0830, telah tidak mematuhi Perintah-Perintah Tetap bertentangan dengan Seksyen 51(1) Akta Angkatan Tentera 1972 melibatkan diri dengan bahan terlarang iaitu Perintah Tetap Pasukan Gugusan Semarang Peninjau BAB p Para 911 (6) yang mana diketahui atau yang sepatutnya ia patut mengetahui telah mengakibatkan air kencingnya positif Dextromethorphan tanpa justifikasi yang sah setelah disahkan oleh Jabatan Kimia Negeri Sabah Malaysia.
>
> PERTUDUHAN KEDUA
>
> TIDAK MEMATUHI PERINTAH-PERINTAH TETAP YANG BERTENTANGAN DENGAN SEKSYEN 51(1) AKTA ANGKATAN TENTERA 1972
>
> Iaitu ia di Pejabat Cawangan Siasatan Khas PROVOS KOTA KINABALU Pangkalan TLDM Kota Kinabalu, Teluk Sepanggar 88846 KOTA KINABALU Sabah, pada 07 Jun 2014 lebih kurang 0830, telah tidak mematuhi Perintah-Perintah Tetap bertentangan dengan Seksyen 51(1) Akta Angkatan Tentera 1972 melibatkan diri dengan bahan terlarang iaitu Perintah Tetap Pasukan Gugusan

A Semarang Peninjau BAB 9 Para 911(6) yang mana diketahui atau yang sepatutnya ia patut mengetahui telah mengakibatkan air kencingnya positif Dexthorphan tanpa justifikasi yang sah setelah disahkan oleh Jabatan Kimia Negeri Sabah Malaysia.

B ('the 2014 charges').

[8] During the hearing on 6 February 2015, the applicant pleaded guilty to both charges and was convicted and sentenced with a fine of 14 days' salary C amounting to RM2,335.07 as well as a reprimand ('the 2015 conviction and sentence').

[9] Subsequently, on or around February 2015, 'Pegawai Memerintah' at that particular time, Lt Kdr Mohd Dahroni bin Abd Kadir ('the first pegawai D memerintah') submitted an application for the termination of the applicant's service ('the first application') pursuant to reg 61(1)(j) of the 2013 Regulations. However, on or around May 2015, the said first application was not approved by the former first respondent ie Tan Sri Abdul Aziz bin Hj Jaafar.

E **[10]** Via a letter dated 15 November 2016, the Pegawai Memerintah, Kdr TLDM Mohamad Nor bin Othman ('the second pegawai memerintah') once again made an application for the applicant to be terminated under reg 61(1)(j) of the 2013 Regulations (the second application). The said second application was subsequently approved by the first respondent on 23 December 2016. F

[11] Thereafter, in January 2017, based on a letter of 'Arahan Dokumentasi Tamat Perkhidmatan' dated 18 January 2017, the applicant was informed that his service has been terminated on 23 December 2016 on the grounds of misconduct in which he was convicted. The said 'Arahan', inter alia, reads: G

> 1. Dengan hormatnya dimaklumkan bahawa anggota tersebut di atas akan menamatkan perkhidmatan di bawah Peraturan 61(1)(j), Rujuk A iaitu 'salah laku yang diadakan oleh askar-laskar itu dan dia telah disabitkan' pada 23 Dis 2016.

H **[12]** Hence, the applicant filed this judicial review action to challenge the said decision.

THE FINDINGS OF THE COURT

I **[13]** In *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515; [1999] 4 CLJ 121, Justice KC Vohrah adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The three grounds described by Lord Diplock are:

(a) illegality;

(b) irrationality; and

(c) procedural impropriety.

[14] By illegality as a ground for judicial review, it means 'that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it' and that '... the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess'.

[15] By irrationality it means 'Wednesbury unreasonableness' and 'applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it'.

[16] By procedural impropriety, it includes 'failure by an administrative tribunal to observe procedural rules that are expressly laid out ...' and 'duty to act fairly'.

[17] In the present application, the applicant's grounds to impugn the decision of the respondents are primarily premised on the issue of illegality:

(a) that the termination was based on an alleged conviction on 23 December 2016, but there was no record to show that the applicant had committed or put on trial or convicted for any misconducts on 23 December 2016;

(b) that the charges framed against the applicant on 24 October 2014 were defective, unclear and uncertain as they failed to specify the details of the alleged misconducts;

(c) that the first respondent's action in approving the applicant's termination based on the grounds specified under reg 61(1)(j) of the 2013 Regulations was a jurisdictional error since the first application under the same rule was not approved by the former first respondent;

(d) that the applicant has become a victim of double jeopardy due to the reason that the former first respondent has rejected the applicant's termination under reg 61(1)(j) of the 2013 Regulations; and

(e) that the official notice of termination of service was never communicated nor served on the applicant. This had created confusion to the applicant and caused the applicant's rights to appeal against the said decision has been denied.

Issue (i)

[18] On this issue, the applicant takes the position that the termination was bad in law as the termination was based on an alleged conviction on 23 December 2016, but there was no record to show that the applicant had committed or put on trial or convicted for any misconduct on 23 December 2016. This is based on the 'Arahan', which, inter alia, reads:

> 1. Dengan hormatnya dimaklumkan bahawa anggota tersebut di atas akan menamatkan perkhidmatan di bawah Peraturan 61(1)(j), Rujuk A iaitu 'salah laku yang diadakan oleh askar-laskar itu dan dia telah disabitkan' pada 23 Dis 2016.

[19] With regards to the above allegation, the applicant states as follows in his affidavit to support the application affirmed on 13 April 2017:

> 8. Saya sesungguhnya menyatakan bahawa pada bulan Januari 2017, saya telah dimaklumkan secara lisan oleh Ketua Kerani, seorang BK PNK 5500977
>
> Afiba binti Mat Nahar bahawa perkhidmatan Pemohon di dalam TLDM telah ditamatkan atas alasan 'salah laku yang dilakukan oleh askar-laskar itu dan dia telah disabitkan pada 23 Dis 2016' (selepas ini dirujuk' tarikh permohonan tamat perkhidmatan diluluskan'). Pemakluman secara lisan ini dibuat berpandukan kepada surat 'Arahan Dokumentasi Tamat Perkhidmatan' bertarikh 18.01.2017 (selepas ini dirujuk sebagai 'Arahan Dokumentasi tersebut').

[20] In response to the applicant's assertion as above, the first respondent, in his affidavit affirmed on 5 July 2017 stated as follows:

> 8. Pernyataan di perenggan 8 Afidavit Pemohon adalah diakui setakat bahawa pemberhentian perkhidmatan Pemohon telah diluluskan oleh saya pada 23.12.2016 dan perenggan 1 surat di eksibit SA-1 mesti dibaca secara keseluruhan yang memberi maksud penamatan perkhidmatan Pemohon yang telah diluluskan oleh saya pada 23.12.2016 dan bukan sabitan pada 23.12.2016.

[21] Having considered the affidavits before me, I accepted the explanation of the first respondent that he had approved the termination of the applicant on 23 December 2016 and that the said date is not a reference to a conviction on 23 December 2016. This can be seen from exh 'SA21' annexed to the applicant's affidavit, which is the '*PERMOHONAN PEMBERHENTIAN ASKAR LASKER*' and in the column '*TANDATANGAN PEGAWAI PEMBERHENTIAN*' is the signature of the first respondent which was signed on 23 December 2016.

Issue (ii)

[22] The second issue raised by the applicant is that the charges framed against the applicant on 24 October 2014 were defective, unclear and

uncertain as they failed to specify the details of the alleged misconducts.

[23] However, I agree with the respondents that the applicant had never challenged the charges and the conviction entered against him on 6 February 2015, after his plea of guilty. Subsequently, the applicant was sentenced with a fine of 14 days' salary amounting to RM2,335.07 and a reprimand.

[24] The applicant did not apply for a review of the 2015 conviction and sentence under s 130 of the Armed Forces Act 1972, which provides as follows:

> 130 Review of summary findings and awards
>
> (1) Where a charge has been dealt with summarily otherwise than by the dismissal thereof, the authority hereinafter mentioned may at any time review the finding or the award.
>
> (2) The said authority is —
>
> (a) the Armed Forces Council; or
>
> (b) any officer superior in command to the officer who dealt summarily with the charge.
>
> (3) Where, on a review under this section, it appears to the said authority expedient so to do by reason of any mistake of law in the proceedings on the summary dealing with the charge or of anything occurring in those proceedings which in the opinion of the authority involved substantial justice to the accused, the said authority may quash the finding.

[25] Added to that, the applicant did not apply to quash or challenge the said conviction and sentence in the courts. Therefore, since the 2015 conviction and sentence have not been quashed or reversed on appeal, the said conviction and sentence cannot now be challenged in these proceedings.

[26] In *Gabongan Kesatuan Pekerja-pekerja Dalam Perkhidmatan-perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor* [1998] 5 MLJ 209; [1997] 1 LNS 251, the applicants have applied to the court for an order of mandamus, directing the respondent to implement the decision of the Public Service Tribunal ('tribunal'). The respondents have objected to the application on the basis that the decision of the tribunal is null and void as the tribunal had acted in excess of jurisdiction. The objection of the respondents was dismissed as they failed to challenge the decision of the tribunal in the first place. The court held as follows:

> *As such, it is not open to the respondents now to argue that the matter is not in fact an anomaly especially since they did not at any time after the tribunal's decision and prior to this case dispute the same. The decision of the tribunal is final, conclusive and binding* on all the parties to the anomaly and its decision cannot be challenged, appealed

against, reviewed, quashed or called in question in any court: s 15(1). Notwithstanding the ouster clause however, the High Court would invariably interfere with the decision if the decision is not according to law for example, when error of jurisdiction or error of law was committed by an inferior tribunal in its award (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL); *Selangor Omnibus Co Ltd v Transport Workers' Union, Malaya* [1967] 1 MLJ 280; *Kannan & Anor v Menteri Buruh dan Tenaga Rakyat & Ors* [1974] 1 MLJ 90). The Public Service Tribunal is an inferior tribunal which is subject to judicial supervision.

But, in this case, *the respondents did not at any time make an application for order of certiorari under O 53 of the Rules of the High Court 1980 to quash the decision of the tribunal.* The ouster clause may not operate to preclude the remedy of certiorari provided the respondents had within six weeks of the decision taken steps to quash the decision. This they failed to do. To say that the respondents are not bound by s 15 of the Act because the tribunal had acted without or in excess of jurisdiction would be to make a mockery of the law. It is not open to any body or person to refuse to abide by a decision of the tribunal legally constituted simply because that body or person is of the view that the decision is wrong. The opinion is irrelevant and of no consequence. The law must prevail. The law has provided for remedies in such an instance and until and unless the body or person concerned avails himself of the remedy, the decision remains a valid and binding one. For the respondents to state that they had not taken any steps to quash the tribunals decision because the decision was invalid and therefore they were not bound to implement it, in my view, is contemptuous and indeed an abuse of the law and the Act. The tribunal is created with the duty to ensure that any anomalies which arise from the implementation of the recommendations of the CCR are resolved. Parliament in its wisdom passed the Act, which binds the respondents (s 15(1)). The respondents must respect and adhere to the decision of the tribunal. (Emphasis added.)

Issue (iii)

[27] On this issue, it is the applicant's case that on or around February 2015, the first *pegawai memerintah* had submitted an application for the termination of the applicant's service pursuant to reg 61(1)(j) of the 2013 Regulations. However, on or around May 2015, the said first application was not approved by the former first respondent ie Tan Sri Abdul Aziz bin Hj Jaafar.

[28] However, via a letter dated 15 November 2016, the second *pegawai memerintah* had once again made an application for the applicant to be terminated under reg 61(1)(j) of the 2013 Regulations and the said second application was subsequently approved by the first respondent on 23 December 2016.

[29] Therefore, the applicant takes the position that the first respondent's action in approving the applicant's termination based on the grounds specified under reg 61(1)(j) of the 2013 Regulations was a jurisdictional error since the

first application under the same Rule was not approved by the former first respondent.

[30] The applicant is challenging his discharge from service, which was approved by the first respondent, to take effect from 23 December 2016. The discharge from service was made pursuant to reg 61(1)(j) of the 2013 Regulations, which reads:

> 61 Discharged from service
>
> (1) The competent authority *may, at any time*, discharge any serviceman from the service of the regular forces on the following grounds:
>
> ...
>
> (j) misconduct committed by the serviceman and he has been convicted;

[31] From the plain reading of reg 61(1) of the 2013 Regulations, it is clear that the competent authority may, *at any time* discharge any serviceman. Therefore, it is within the discretion of the respondent to discharge a serviceman, at any time. Therefore, there is no time frame imposed with regards to the discretion of the respondent to discharge any serviceman.

Issue (iv)

[32] The next issue is whether the applicant has become a victim of double jeopardy due to the reason that the former first respondent has rejected the applicant's termination under reg 61(1)(j) of the 2013 Regulations.

[33] The applicant relied on the case of *Palautah a/l Sinnappayan & Anor v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 295; [2009] 3 MLRA 307, where the Federal Court held as follows:

> [12] ... It is the appellants' contention that since the appellants had been acquitted and discharged from the charge, the detention orders later issued against them are therefore invalid. Article 7(2) of the Federal Constitution lays down the principle that a person shall not be placed in 'double jeopardy' and be punished twice for the same offence. In the present case, it is the contention of the appellant that they have been punished twice for the same offence.

[34] The protection against double jeopardy in this country is provided by art 7 cl 2 of the Federal Constitution, which reads:

> 7(1) ...
>
> (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been

quashed and a retrial ordered by a court superior to which he was acquitted or convicted.

[35] In *Public Prosecutor v Teh Cheng Poh* [1978] 1 MLJ 68b, Arulanandom J held that a person cannot be said to be in double jeopardy unless he has been convicted or acquitted for the same offence before.

[36] On the same issue of double jeopardy, Justice Suriyadi made the following finding in *Lye Pong Fong v Public Prosecutor* [1998] 6 MLJ 304 at p 309:

> ... if a detention order is not a conviction, then surely a restrictive residence order will never qualify. If no conviction has been recorded, then it follows that the issue of double jeopardy does not arise at all ... Even if the subject's liberties are curtailed, by reason of the fact that the normal criminal and preventive laws are complimentary to each other, the concept of double jeopardy as provided by law are inapplicable here.

[37] In fact in the case relied by the applicant, in *Palautah Sinnappayan*, the Federal Court made the following finding:

> [14] With respect, we could not agree with the contention of the appellants that the doctrine autrefois acquit applies to the appellant's case. We are of the view that the scope and extent of protection enshrined under art 7(2) of the Federal Constitution only applies to criminal offence wherein a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence.

[38] Therefore, the principle of double jeopardy only applies in criminal conviction, whereby a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence. In the present case, the applicant is not being tried on the same charges as in the 2014 charges but challenging his termination from the TLDM.

Issue (v)

[39] The last pleaded issue is that the official notice of termination of service was never communicated nor served on the applicant. There is no submission on this but on the facts, it is not in dispute that the applicant was informed orally on this as can be seen from para 5.4 of the affidavit affirmed by Mohamad Nor bin Othman on 7 July 2017:

> 5.4 Saya seterusnya mengarahkan anggota untuk memaklumkan Pemohon mengenai pemberhentian Pemohon dan menguruskan proses pemberhentian Pemohon sebagaimana isi kandungan surat yang telah dirujuk oleh Pemohon do eksibit SA-1Afidavit Pemohon. *Saya kemudiannya memanggil Pemohon di pejabat saya dan memaklumkan semula tentang pemberhentian perkhidmatan Pemohon kepada Pemohon dan meminta Pemohon meneruskan dengan proses perolehan kad*

pengenalan dan sebagainya. (Emphasis added.)

CONCLUSION

[40] In the present case, reg 61(1)(j) empowered the respondents to discharge the applicant at any time premised on a 'misconduct committed by the serviceman and he has been convicted'. Since there was a misconduct resulting in the 2015 conviction and sentence against the applicant, there is a legal basis for the respondents to make the discharge order against the applicant.

[41] In *Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor* [2011] 2 MLJ 573; [2011] 2 CLJ 1, the Federal Court said as follows:

> [19] One other more pertinent reason is the *necessity to maintain discipline within the armed forces which is absolutely vital if the military is to be functional and efficient. Any compromise to this would affect the discipline and threaten the chain of command necessary to effectively defend the nation*. (Emphasis added.)

[42] In the present case, the applicant had pleaded guilty and was convicted for the charges of 'Tidak Mematuhi Perintah-Perintah Tetap Yang Bertentangan Dengan Seksyen 51(1) Akta Angkatan Tentera 1972' when the applicant's urine test was found positive of dextromethorphan and dextorphan. Therefore, I am of the considered opinion that if the military is to be functional and efficient, it cannot afford to have members whose urine are found positive of drugs abuse.

[43] Premised on the reasons enumerated above, I am of the considered opinion that there is no merit in the application and the same is dismissed with costs.

Application dismissed with costs.

Reported by Dzulqarnain Ab Fatar